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No. 84-578 (2)

In The

Supreme Court of the United States

October Term, 1984

AVTEX FIBERS, INC.,

Petitioner,

vs.

ROBERT L. McDOWELL,

Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Robert McDowell, having worked for Avtex Fibers, Inc. ("Avtex") as a professional chemist for more than 29 years, was fired by Avtex at age 57 on January 26, 1980 during a reduction in force. McDowell subsequently brought an action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

He charged he had been discharged because of his age, and he sought reinstatement with full back pay and appropriate benefits, liquidated damages, costs, attorney's fees, and such other relief as the court deemed appropriate.

By stipulation and pursuant to 28 U.S.C. § 636(c)(1) the parties agreed to present the case to a magistrate and to a twelve person jury. Proceeding before the jury with respect to the question of liability, Mr. McDowell presented essentially four types of evidence to show he had been terminated because of his age:

1. Proof of his own qualifications to perform work that Avtex continued after his termination;
2. Proof that the justifications proferred by Avtex for retaining younger professionals instead of Mr. McDowell were pretextual and unworthy of credence;
3. Statistical proof that the older professionals were significantly more likely to be terminated than the younger professionals; and
4. Proof that Mr. Hettich, the person solely responsible for determining which employees should be laid off, and his managers had attitudes marked by a preference for youth.

In its defense Avtex disputed McDowell's version of the facts, arguing that McDowell had been terminated because he was less qualified than other employees, rather than because of his age. Avtex also presented its own statistics seeking to establish that the terminations implemented by Avtex did not reflect a discriminatory purpose. (JA 66-100).

The jury resolved these credibility disputes in McDowell's favor, finding that but for McDowell's age, Avtex would not have discharged him and that Avtex was thus liable under the ADEA.

Following the jury's issuance of its verdict, Avtex agreed to reinstate McDowell to a position comparable to that which he occupied prior to his termination, to pay him his prior salary augmented by the minimum increases he would have received had he remained at Avtex, and to restore his other employment benefits to the levels they would have reached had he remained at Avtex. (Pet. for Cert. A8-A11). The remaining damage issues were submitted to the magistrate.

The magistrate concluded that McDowell was entitled to $47,593.01 in back pay and an equal sum in liquidated damages. Certain of the magistrate's conclusions were not challenged by either party on appeal: his computation of the basic salary and health benefits McDowell should have received, and his subtraction from this figure of the termination pay, vacation pay, and interim earnings McDowell received. The magistrate also deducted, however, the amount of the state unemployment benefits McDowell had received upon termination,[1] and the pension plan payments McDowell received between the unlawful discharge and reinstatement. Both of these deductions were appealed by McDowell to the Third Circuit.

Finally, the magistrate concluded that as Avtex had willfully violated the ADEA, McDowell was entitled to

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[1]The magistrate did not deduct those unemployment benefits which were federally funded without any contribution by the defendant. (Pet. for Cert. A4-A5).

liquidated damages in an amount equal to the back pay award. *See* 29 U.S.C. § 626(b). In determining whether Avtex had discriminated willfully the magistrate looked to the definition of "willful" provided by the Third Circuit in *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980). Stating:

> "Applying the definition supplied in *Wehr v. Burroughs, supra,* the issue here is whether the discharge of the plaintiff was because of age and was voluntary and not accidental, mistaken or inadvertent. (Alternatively, the issue can be stated in terms of whether the plaintiff's discharge was precipitated in reckless disregard of its consequences.)"
>
> "The jury found, based on the evidence presented, that the plaintiff's discharge was because of age. Upon a thorough review of that evidence, I find no basis for concluding that the plaintiff's discharge was not voluntary and that it was accidental, mistaken or inadvertent. I find, therefore, that his discharge was willful within the meaning of the ADEA and that he is entitled to liquidated damages measured as an amount equal to his net back pay."

(Pet. for Cert. A6-A7). Avtex appealed the finding of willfulness to the Third Circuit.

Ruling on the parties' cross-appeals, the Third Circuit held for McDowell on all three disputed issues. It found that the magistrate based his award of liquidated damages on the proper legal standard and that the evidence was sufficient to support his finding of willfulness. (Pet. for Cert. A13-A21). The Third Circuit determined however that the magistrate had erred in deducting the pension and state employment benefits from McDowell's back pay award. (Pet. for Cert. A13-21).

Avtex now petitions for a writ of certiorari on each of these three issues.[2] However, for the reasons set forth below it would be inappropriate for the Court to grant a writ of certiorari with respect to any of the questions formulated by Avtex.

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REASONS FOR DENYING THE WRIT

I. This Court Should Not Reach Out To Reassess A Definition Of "Willful Violation" Of The ADEA Which Is Consistent With the Statutory Language And Legislative History And Where Any Split Among The Circuits Is Irrelevant To The Facts Of This Case.

A. Under Any Of The Circuits' Definitions Avtex "Willfully" Violated The ADEA When It Fired McDowell Because Of His Age.

As Avtex argues and as this Court recognized by granting certiorari as to the "willfulness" question in *Trans World Airlines, Inc. v. Thurston*, No. 83-997, *cert. granted*,

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[2]Avtex presents the following questions for review:

"1. Whether a 'willful' violation of the Age Discrimination in Employment Act, and thus an entitlement to liquidated damages, may be established pursuant to a legal standard which requires no evidence that the defendant intentionally or recklessly violated the Act?

2. Whether the Court of Appeals erred in holding that pension benefits paid to the plaintiff after termination of employment may not, as a matter of law, be deducted from an award of back pay under the Age Discrimination in Employment Act?

3. Whether the Court of Appeals erred in holding that unemployment compensation benefits paid to the plaintiff after termination of employment may not, as a matter of law, be deducted from an award of back pay under the Age Discrimination in Employment Act?"

— U.S. —, 104 S. Ct. 1412 (1984),[3] the Circuits have used different terminology in seeking to define "willful" in the context of the liquidated damages provision of the ADEA. While it is not entirely clear how much these definitions differ in actual practice, they appear to set somewhat different standards for what the employer needs to have known, and the level at which he needs to have had such knowledge, to be found to have acted willfully. For example, with respect to what the employer needs to have known, some Circuits look to whether the employer deliberately, knowingly or voluntarily discharged plaintiff because of his age.[4] Other Circuits look instead to whether the employer was at some level aware the act was *governed* by the ADEA.[5] The language employed by two Circuits apparently looks to whether an employer was at some level aware of the *illegality* of his action.[6]

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[3]The Court heard argument on this case and on its cross appeal, on October 9, 1984.

[4]*See, e.g., Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981); *Wehr v. Burroughs*, 619 F.2d 276, 283 (3d Cir. 1980).

[5]*See, e.g., Haskell v. Kaman Corp.*, — F.2d —, 35 Fair Empl. Prac. Cas. (BNA) 941 (2d Cir. 1984); *EEOC v. Prudential Federal Savings and Loan Association*, 741 F.2d 1225, 1233 (10th Cir. 1984); *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981).

[6]*See Heiar v. Crawford County*, — F.2d —, 35 Empl. Prac. Dec. (CCH) ¶ 34,614 (7th Cir. 1984) ("plaintiffs must show that the [defendant] should have known it was violating the Act"); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) (in dicta, while not purporting to decide the circumstances under which an employer's action would be held willful, the court quotes the definition of willfulness used in a criminal context.)

The Circuits also use different language to express the requisite level of knowledge for a finding of "willfulness." Some require conduct which is either knowing, voluntary or in reckless disregard to its consequences;[7] some look to whether the conduct was or should have been knowing;[8] others require conduct which is deliberate, intentional or knowing;[9] and one in dicta requires that the defendant have acted with "specific intent," that is the "bad purpose either to disobey or disregard the law."[10]

However, while the differences between these standards might, in certain factual circumstances, yield different answers to the question of whether an employer acted willfully, the standards all converge when applied to the facts of this case. The only defense put forward by Avtex in response to McDowell's charge of age discrimination was that in fact Avtex had been motivated by factors other than age, in particular its need to reduce the workforce and McDowell's relative lack of qualifications. The jury re-

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[7]*See, e.g., Airline Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983), *cert. granted sub nom., Trans World Airlines, Inc. v. Thurston*, No. 83-997, — U.S. —, 104 S. Ct. 1412 (1984); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983); *Wehr v. Burroughs*, 619 F.2d 276, 283 (3d Cir. 1980).

[8]*See, e.g., Heiar v. Crawford County*, — F.2d —, 35 Empl. Prac. Dec. (CCH), ¶ 34,614 (7th Cir. 1984); *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982).

[9]*See, e.g., Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981); *Hedrick v. Hercules*, 658 F.2d 1088, 1096 (5th Cir. 1981).

[10]*Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) (dicta).

jected this defense when it concluded that Avtex fired McDowell because of his age.[11]

Avtex now seeks to argue that although it fired McDowell because of his age, rather than for any valid reason, it did not act "willfully." However, Avtex presented no evidence to prove that although it fired McDowell because of his age, it did not do so "willfully." Thus, although Avtex makes a great deal of the theoretical distinction between knowingly discharging a person and knowingly violating the ADEA, (Pet. for Cert. at 14-15, 17-18), the distinction has no meaning given the facts of this case.

Nor does the determination of whether Avtex acted willfully turn on Avtex' level of knowledge when it terminated McDowell. The jury rejected Avtex' only profferred defense of good motive or lack of knowledge when it found Avtex terminated McDowell because of his age. Therefore, under any of the standards of knowledge, bad purpose, actual knowledge, attributed knowledge, or reckless disregard, Avtex acted willfully.

In sum, given the facts of this case it would be inappropriate for the Court to reach the issue of the proper standard for "willfulness" because under any of the proposed definitions, Avtex acted willfully.

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[11]The magistrate had instructed the jury that:

> ". . . the plaintiff has the burden of establishing, by a preponderance of the evidence, that age was a 'detemina-tive factor' in the defendant's decision to discharge him in the sense that but for this age he would not have been discharged."

and that

> "the ultimate issue in this case is whether the plaintiff, personally, was discharged as a result of unlawful age discrimination."

(JA 197-98).

B. The Third Circuit's Definition Of Willfulness Is Consistent With The Legislative History Of The ADEA.

Defendant is incorrect when it repeatedly argues that the Third Circuit's definition of "willfulness" under the ADEA would "lead to an automatic award of liquidated damages" and is thus inconsistent with the legislative history of the ADEA. (*See* Pet. for Cert. at 14-15.) Plaintiff agrees that such an automatic entitlement would be improper given Congress' explicit provision that liquidated damages are only available where there has been a willful violation. 29 U.S.C. § 626(b). *See also Lorillard v. Pons,* 434 U.S. 575, 581 (1978). However, the Third Circuit standard creates no such automatic award.

In *Wehr v. Burroughs,* 619 F.2d 276 (3d Cir. 1980), the Third Circuit first articulated the standard applied both by the trial court and by the Third Circuit on appeal in this case:

> "It is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent. In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences."

619 F.2d at 283.

Neither the trial court nor the Third Circuit interpreted this standard as creating an automatic entitlement to liquidated damages once the jury had made its finding of liability. Rather, both recognized that an independent review of the evidence was appropriate. The magistrate stated: "Upon a thorough review of that evidence, I find no basis for concluding that the plaintiff's discharge was

not voluntary and that it was accidental, mistaken, or inadvertent." (Pet. for Cert. at A-7). On appeal the Third Circuit criticized the magistrate's stylistic choice in using a double negative to describe the results of his independent evidentiary review, (Pet. for Cert. A22-A24), and performed its own independent review of the evidence, thereby implicitly endorsing the need for such independent review even though the jury had found Avtex liable.

Moreover, while it may be true that the limited nature of Avtex' defense in this case virtually assured a finding of willfulness once a finding of liability had been made against Avtex, this would not be so in many cases. If an employer can show it made a mistake when it violated the ADEA, liquidated damages would not be appropriate. For example, where an employer's defense to a charge of age discrimination is that the age limit set for a particular job was a bona fide occupational qualifiation (BFOQ), *see* 29 U.S.C. § 623(f)(1), a court might easily find the employer violated the ADEA but did not do so willfully.[12] Similarly, an employer might be held liable under the ADEA but not required to pay liquidated damages under the Third Circuit standard if the employer mistakenly thought it was observing the terms of a bona fide seniority system, *see* 29

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[12]*See, e.g., Heiar v. Crawford County,* — F.2d —, 35 Empl. Prac. Dec. (CCH) ¶ 34,614 (7th Cir. 1984), in which the Seventh Circuit reasoned that although the medical evidence did not support the county's claim that deputy sheriffs could be required to retire at age 55, the county did not act "willfully" because many laws actually require law enforcement officers to retire at age 55 and because the county did not realize when it discharged the officers that its medical evidence would turn out to be insufficient to establish a BFOQ.

U.S.C. § 623(f)(2), was terminating a bona fide executive or person in a high policy making position who was entitled to an immediate nonforfeitable annual retirement benefit, *see* 29 U.S.C. § 631(c) (1), or was terminating a person over the age of 70. *See* 29 U.S.C. § 631(a). Finally, if an employer was found to have violated the ADEA under a disparate impact theory, which required the plaintiff to show only that the employer's facially neutral standard nevertheless violated the ADEA because it had a disparate impact on persons over the age of 40, and was not justified by business necessity, the court might well find that the violation had not been willful.[13]

Nor does the Third Circuit's definition of willfulness conflict with any explicit legislative history defining this term. As many courts have recognized, Congress gave no specific direction as to how "willful" should be interpreted.

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[13]*Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981), recognizes this distinction:

> "In finding under proper instructions, that Heublein had denied Goodman a promotion *because of* age, the jury necessarily concluded that Heublein's action was intentional. In a discriminatory treatment case, such as this, an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason. On the other hand, in a discriminatory impact case, where an employer acts on the basis of some standard that is shown, in practice, to have a disproportionate impact on some group identifiable by a characteristic such as age, a finding of liability will not inevitably mean that the employer discriminated intentionally."

Id. at 131 n.6. (emphasis in original). However the Second Circuit apparently failed to recognize that liquidated damages might be inappropriate in certain disparate treatment cases as well.

See, e.g., Kelly v. American Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 282 (3d Cir. 1980). Avtex' attempt to create such legislative history by construing a comment of Senator Javits in 1976 to characterize the liquidated damages provision as punitive in nature and then drawing upon Prosser's *Law of Torts* for the definition of punitive damages fails for several reasons. First, in passing the 1978 amendment to the ADEA the House Conference Report specifically stated that liquidated damages are compensatory rather than punitive. Describing the new damages provision the Report stated:

> "[I]t includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA."

H. Conf. Rep. No. 95-950, 95th Cong. 2d Sess. 13-14, *reprinted* in 1978 U.S. Code Cong. & Ad. News, 535.

The Report further explained that:

> "The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages.' *Overnight Transportation Company v. Missel*, 316 (1942)."

Id.

This subsequent and explicit statement in a House Report certainly carries more weight than Senator Javits'

ambiguous remark in 1976. Moreover, the statement of Senator Javits relied upon by Avtex does not in fact characterize the liquidated damages as punitive. The Senator stated only that:

> "[T]he criminal penalty in cases of willful violation has been eliminated and a double damage liability substituted. This will furnish an effective deterrent to willful violations and at the same time avoid the difcult problems of proof which would occur under a criminal provision."

113 Cong. Rec. 7076 (1976).

The mere fact that the liquidated damages measure might have been designed in part to encourage employers to comply with the ADEA does not mean it should be interpreted like a criminal statute.

In sum, the Third Circuit's standard for willfulness is consistent with the statutory language and the legislative history, and any differences with the other Circuits' standards are irrelevant to the facts of this case.

II. The Third Circuit's Determination That Unemployment And Pension Benefits May Not Be Subtracted From A Discriminatee's Back Pay Award Under The ADEA Is Consistent With The Statutory Language, Legislative History, And This Court's Determinations, And Does Not Create The Sort Of Conflict Among The Circuits Which Requires Resolution By This Court.

A. The Third Circuit's Rule Barring The Deduction Of Unemployment Insurance And Pension Payments From Back Pay Awards Does Not Create The Sort Of Conflict Among The Circuits Which, Spawning Uncertainty, Requires Resolution By This Court.

Avtex argues that the Third Circuit erred when, failing to bow to the magistrate's exercise of his discretion,

it held that unemployment compensation and pension payments could not be subtracted from the back pay award provided to a plaintiff who had prevailed under the ADEA. According to Avtex, such determinations may be rendered only by a trial court. Avtex further contends that the Supreme Court must take certiorari on these issues to resolve the split among the Circuits and to provide "the business community with much needed guidance." (Pet. for Cert. 18).

There is however no genuine conflict among the Circuits requiring resolution by this Court. No Court of Appeals has held that pension or unemployment payments *must* be deducted from a back pay award. Moreover, while several Courts of Appeals have permitted district courts to exercise their discretion in determining whether pension or unemployment benefit payments should be deducted from a back pay award,[14] the introduction of the Third Circuit's rule will not create uncertainty either as to how employers should act in order to comply with the ADEA or as to how back pay awards should be calculated under that Act.

The ADEA clearly prohibits discrimination on the basis of age and authorizes the use of back pay awards

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[14]Four Circuits have determined that the deduction of unemployment insurance benefits should be left to district courts' discretion. *See Syvock v. Milwaukee Boiler Mfg., Co.*, 665 F.2d 149, 162 (7th Cir. 1981); *Naton v. Bank of California*, 649 F.2d 691, 699-700 (9th Cir. 1981); *EEOC v. Sandia Corp.*, 639 F.2d 600, 624-25 (10th Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977). The Seventh Circuit has similarly held that the question of whether pension benefits should be deducted is a matter for the trial court's discretion. *Orzel v. City of Wauwatosa Fire Dept.*, 677 F.2d 743, 756 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 484 (1983). *See also Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86-87 (2d Cir. 1983) (same).

and injunctive relief to enforce that prohibition. Therefore, the Third Circuit's adoption of a rule barring the deduction of unemployment insurance and pension payments from back pay awards will not make employers uncertain as to whether or not they may discriminate on the basis of age. Nor has Avtex argued that the Third Circuit rule would make employers uncertain as to how to conduct any other aspect of their business.

In fact, it is the rule proposed by Avtex, requiring deference to the trial court's discretion, which creates uncertainty. Neither Avtex nor the Circuit Courts which routinely defer to trial court damages calculations have clearly set forth any standards for the district court to following in exercising its discretion. Therefore, district courts have reached opposite conclusions for no apparent reason[15] and employers cannot easily predict how back pay awards will be calculated. By contrast the Third Circuit rule puts all employers on notice that they will be required to pay a full back pay award if they violate the ADEA.

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[15]For example, the following district courts determined that unemployment benefits should not be deducted but referred to no particular factual aspect of the case to support their decisions: *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 951 (D.Col. 1979); *Abron v. Black & Decker Mfg. Co.*, 439 F. Supp. 1095, 1115 (D. Md. 1977); *Inda v. United Air Lines, Inc.*, 405 F. Supp. 426, 435 (N.D. Cal. 1975). Similarly, the following district courts determined that employment benefits should be deducted but provided at most general policy arguments unrelated to the particular facts of the case to support their holdings: *Schulner v. Jack Eckerd Corp.*, 572 F. Supp. 56, 59 (S.D. Fla. 1983); *Gathercole v. Global Associates*, 560 F. Supp. 642, 648 (N.D. Cal. 1983), *rev'd on other grounds*, 727 F.2d 1485 (9th Cir. 1984); *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 712-13 (E.D. Wis. 1978); *Coates v. National Cash Register Co.*, 433 F. Supp. 655, 663 (W.D. Va. 1977).

In sum, were the Court to grant the writ of certiorari and to adopt the rule of deference to district court discretion sought by Avtex, it would not resolve employers' uncertainty as to how back pay awards will be calculated.

B. The Third Circuit's Prohibition On The Deduction Of Unemployment Insurance And Pension Payments From Back Pay Awards Is Consistent With The Statutory Language And Legislative History Of The ADEA And With The Determinations Of This Court.

Although neither the language nor the legislative history of the ADEA itself expressly address the issues of whether an employer should be permitted to deduct unemployment insurance and pension plan payments from the back pay award it is required to pay, the statutes upon which the ADEA was based indicate that such deductions are inappropriate. As this Court has held, the ADEA was modeled in large part upon Title VII, 42 U.S.C. § 2000e *et seq., see Lorillard v. Pons,* 434 U.S. 575, 584 (1978), and the back pay provision of Title VII was in turn "expressly modeled on the back pay provision of the National Labor Relations Act," ("NLRA"), *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419 (1975) (footnote omitted). It is thus appropriate to look for guidance to *National Labor Relations Board v. Gullet Gin Co.,* 340 U.S. 361, 364 (1951) in which the Supreme Court, interpreting the NLRA, upheld the NLRB's refusal to deduct unemployment benefits from the back pay award owed by an employer. The Court stated:

> "To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should

> be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received."
>
> "But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state. . . . We think these facts plainly show the benefits to be collateral."

National Labor Relations Board v. Gullett Gin Co., 340 U.S. 361, 364 (1951) (citations omitted.) Moreover, while the *Gullett* decision deals expressly with unemployment insurance payments, its reasoning applies equally to pension plan payments. Like unemployment insurance payments, pension payments are made for a social purpose wholly distinct from that of compensating a victim of discrimination. *See Gullett,* 340 U.S. at 364. Similarly, although the pension payments were funded by the employer, this does not distinguish them from the unemployment insurance payments at issue in *Gullett* which the Court recognized were funded by employer taxes. *Id.*

The Third Circuit's prohibition on the deduction of unemployment insurance benefits and pension payments from ADEA back pay awards is also consistent with that statute's twin purposes of eradicating discrimination and making whole the victims of discrimination. In *Albe-*

marle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975), the Court explained that Title VII's "primary objective," "equality of employment," requires an effective back pay award, noting that "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Id.* As three Courts of Appeal besides the Third Circuit have held in the context of Title VII, permitting discriminating employers to lessen their back pay awards by the amount of the unemployment insurance their victims received would undercut the statute's antidiscriminatory purpose.[16] This reasoning is equally applicable to the ADEA. *See Lorillard,* 434 U.S. at 584. Employers will feel more free to discriminate if they know that they will be permitted to offset benefits designed for wholly separate social purposes against any back pay award they are ultimately required to pay. Permitting such offsets brings the back pay remedy closer to the injunctive remedy this Court has recognized would be insufficient to deter discrimination. *See Albemarle Paper,* 422 U.S. at 417.

Moreover, the necessity for effective back pay relief is implanted even more strongly in the ADEA than in Title VII. Whereas back pay is considered a discretionary award under Title VII, *Lorillard v. Pons,* 434 U.S. at 584, it is mandatory under the ADEA. *Id.* at 584 ("the ADEA

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[16]*Brown v. A.J. Gerrard Mfg. Co.,* 715 F.2d 1549, 1550 (11th Cir. 1983) (en banc) (per curiam); *Kauffman v. Sidereal Corp.,* 695 F.2d 343, 346-47 (9th Cir. 1982) (per curiam); *EEOC v. Ford Motor Co.,* 645 F.2d 183, 195-96 (4th Cir. 1981), *rev'd on other grounds,* 458 U.S. 219 (1982), *reaffirming original position on remand,* 688 F.2d 951, 952 (4th Cir. 1982) (per curiam). The Third Circuit held that unemployment insurance payments could not be deducted from Title VII back pay awards in *Craig v. Y & Y Snacks, Inc.,* 721 F.2d 77 (3d Cir. 1983).

incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime").

Permitting employers to offset the unrelated unemployment insurance and pension payments also allows them to escape the liquidated damages provision of the ADEA. While 29 U.S.C. § 626(b) requires an employer who discriminates "willfully" to make an additional liquidated damages payment equal to the back pay award, the willful discriminator can avoid such a payment to the extent he can offset the back pay award with unemployment insurance or pension payments made for a wholly separate purpose. Therefore, while permitting the offset would benefit all discriminators, willful discriminators would receive double benefits.

As the language and reasoning of *Gullet* indicates, the Third Circuit rule is also consistent with the make-whole purpose of the ADEA. In the words of the Court:

> "Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received."

340 U.S. at 364.

Given the existence of collateral benefits such as unemployment insurance, either the discriminator or the discriminatee will receive a windfall. If the discriminator is permitted to reduce his back pay obligation by the amount of the collateral benefit and perhaps an equal amount in liquidated damages, he will receive the windfall and will thus

have less incentive not to discriminate. On the other hand, if the discriminatee is allowed to collect the full back pay and liquidated damages award, even though she already received an unemployment insurance payment, it is not clear she will receive a true windfall. As the Supreme Court recognized in *Gullet,* the discriminatee may well have suffered collateral losses such that the award of the collateral benefit would not make her more than whole. 340 U.S. at 364.

Finally, Avtex has pointed to no statutory language, history, or purpose which supports the notion that trial courts should be permitted to exercise unbounded discretion in determining whether or not to deduct unemployment insurance and pension payments from back pay awards. The determination turns not on evidentiary or factual questions, perhaps best left to the trier of fact, but rather on interpretations of statutory language and legislative intent.[17] There is no reason to leave such decisions to the unbounded discretion of a trial court.

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[17]District courts exercising their discretion either to deduct the benefits or not to deduct them are basing their decisions on policy considerations rather than on factual differences between the cases. *See supra* note 15.

CONCLUSION

In sum, the writ of certiorari should not be granted. The Third Circuit's rule barring the deduction of unemployment insurance and pension payments from back pay awards does not create uncertainty as to how employers should conduct themselves and is consistent with the language, history and purposes of the ADEA.

Respectfully submitted,

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